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Supreme Court of the United States.

OCTOBER TERM, 1906.

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JAMES H. McKENN

No. 16.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO APPLICATION FOR ISSUE OF WRIT OF MANDAMUS.

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Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 16 (Original.)

IN THE MATTER

OF

The application of JAMES POLLITZ for a writ of mandamus against the Honorable E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit and against the Circuit Court of the United States for the Southern District of New York.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE ISSUE OF A WRIT OF MANDAMUS.

Statement.

Upon the petition of James Pollitz filed in this Court for a writ of *mandamus*, and upon motion, a rule was entered on March 25, 1907, directing the Honorable E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit in and for the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York, to show cause on April 8, 1907,

why a writ of *mandamus* should not issue in accordance with the prayer of said petition. The purpose of the writ is to obtain the remand to the Supreme Court of the State of New York, in and for the County of New York, of a suit commenced therein by James Pollitz, a citizen and resident of the City, County and State of New York, against The Wabash Railroad Company and others, which action was removed from said Court into the Circuit Court of the United States for the Southern District of New York by the defendant The Wabash Railroad Company on the ground that a separable controversy existed between the plaintiff and the defendant The Wabash Railroad Company, a complete determination of which could be had without the presence of any of the defendants in the action other than the defendant The Wabash Railroad Company, and that all of said other defendants were neither indispensable nor necessary parties to the complete determination of said separable controversy, which was solely between the plaintiff and said defendant The Wabash Railroad Company, citizens of different States.

A motion was subsequently made by the plaintiff to remand said suit to the Supreme Court of the State of New York, in and for the County of New York, which motion, after having been heard and considered, was denied in accordance with the opinion given by the United States Circuit Court for the Southern District of New York, and an order denying said motion entered therein.

ARGUMENT.

POINT I.

Mandamus is not the proper remedy.

It is a well-settled doctrine, laid down by an unbroken line of decisions in the Supreme Court of the United States, that the writ of *mandamus* will not be

made to perform the office of an appeal or writ of error to review the action of an inferior court taken in the lawful exercise of its jurisdiction, or be issued to reverse or amend the decision of an inferior tribunal when the decision was within the scope of its jurisdiction.

The ordinary functions of a writ of *mandamus* directed to an inferior court is to command and compel action by the inferior court in cases where action should be properly taken by it, and to prevent the court below from exercising or attempting to exercise jurisdiction in cases where no such jurisdiction exists, as well as preventing abuses of judicial discretion.

In cases where the record discloses no lack of jurisdiction, and where judicial acts have been performed by the inferior court, these may not be reviewed in any other manner than that properly prescribed through writ of error or appeal.

In order to properly consider the true functions of the writ of *mandamus*, it is necessary to refer to the source of power for the issuing of the writ and the cases in which it has been exercised; but before referring to these cases, we wish to direct the attention of the Court to the particular action taken by the court below, and which is sought to be reviewed in this proceeding.

The suit, for the remand of which the motion was made and denied by the Circuit Court of the United States for the Southern District of New York, was originally commenced in the Supreme Court of the State of New York for the County of New York by the petitioner, a citizen of the State of New York and a resident of the Southern District, against The Wabash Railroad Company, a foreign corporation, and certain other defendants. Subsequently, a petition for the removal of this suit into the United States Circuit Court for the Southern District of New York was filed by the defendant The Wabash Railroad Company, on the ground that a separable controversy existed between the plaintiff and the defendant The Wabash Railroad Company, a complete determination of which could be had without the presence of any of the

other defendants, who were neither indispensable nor necessary parties to the complete determination of the separable controversy, which was solely between the plaintiff in said suit and the defendant The Wabash Railroad Company, citizens of different States.

Bond having been filed and approved, the action was removed into the United States Circuit Court for the Southern District of New York and a transcript of the record filed in that Court.

Subsequently, the plaintiff in said suit made a motion to remand the same into the Supreme Court of the State of New York, in and for the County of New York, which motion, having been argued, was denied, and an opinion delivered by said Court.

In the opinion of the United States Circuit Court denying the motion to remand to the state court, the right of the defendant The Wabash Railroad Company to remove the cause, on the ground stated in its petition for removal, is expressly upheld, the Court using the following language in its opinion, to which we call special attention :

It is manifest that complainant can obtain complete relief without the presence of these additional parties. When he shall, by action against the Wabash Company, have established the proposition that the new bonds and stock are void, he need not concern himself with the re-exchange of such as may have been delivered ; they will not constitute valid obligations against the railroad and therefore will not affect the value of his stock. Individual holders of such of the new securities as have been issued may be allowed to intervene at the discretion of the court, but their presence is not essential to the determination of the fundamental issues raised by the complaint. It is difficult to escape the conviction that these additional ' parties ' have been brought into the case with the sole purpose of preventing, if possible, the removal of the cause."

Statutes.

The power of the Supreme Court of the United States to issue writs of prohibition or *mandamus* is

found in Sec. 688, Revised Statutes of the United States, 2d Edition, as follows :

"The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction ; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party."

The present general jurisdiction of the Circuit Courts of the United States by original process is prescribed by the Act of March 3, 1875, ch. 137, as amended by the Act of March 3, 1887, ch. 373, Sec. 1, and the Act of August 13, 1888, ch. 866, Sec. 1 (1 Supplement Revised Statutes 611), which Section reads as follows :

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

The general right of removal into the Circuit Court of the United States is governed by the Act of March 3, 1875, ch. 137, Section 2, as amended by the Act of March 3, 1887, ch. 373, Sec. 1, and the Act of August 13, 1888, ch. 866, Sec. 1 (1 Supplement Revised Statutes, 612), by the first Section of which latter Act the second Section of the Act of 1875 was amended so as to read as follows :

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the

preceding Section, (quoted above), which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.

"Any other suit of a civil nature, at law or in equity of which the circuit courts of the United States are given jurisdiction by the preceding Section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

"And when in any suit mentioned in this Section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

* * * * * *

"Whenever any cause shall be removed from any State Court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

The last paragraph quoted above superseded and repealed Section 5 of the Act of 1875, in which it was provided that

"The order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

DECISIONS.

In the case of

United States vs. Lawrence,

[3 Dallas' Reports, 42],

which records the first application to the Supreme Court of the United States for a writ of *mandamus*, an attempt was made to use this writ to compel the

Honorable John Lawrence, Judge of the District of New York, to issue a warrant for apprehending Captain Barre as a deserter from the French frigate Le Perdrix, which warrant Judge LAWRENCE, after careful consideration, had refused to issue upon demand of the French Vice-Consul.

Reporter DALLAS' syllabus to this case is a terse and correct statement of the Court's decision and of a principle controlling the writ of *mandamus*, which has been since steadily adhered to by the Supreme Court :

"A *mandamus* will not be granted, to compel a judicial officer to decide otherwise than according to the dictates of his own judgment."

The Supreme Court in its opinion says [p. 53] :

"We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident, that the district judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre ; and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment, but his own."

One of the earliest cases in which the writ of mandamus has been allowed by the Supreme Court is the case of

Ex Parte Bradstreet,

[7 Peter's Reports, 634],

where the District Court, having dismissed the case for want of jurisdiction, a motion was made to reinstate the case and to amend by inserting an averment correcting the jurisdictional objection, which motion was denied. The Supreme Court, in ordering the writ to issue, stated, through Chief Justice MARSHALL, that although the Supreme Court ought not to exercise any control over the proceedings of the District Court in allowing or refusing to allow amendments in the proceedings, still, in order that the right of every party to have the judgment of the Supreme Court in a suit brought by

him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000, it was necessary to require the reinstatement of the case in the inferior court and a final judgment therein, in order that an appeal from such judgment might be had to the Supreme Court. The *mandamus* was issued for this purpose.

In the case of

Ex Parte Bradley,

[7 Wallace's Report, 364],

application was made to the Supreme Court for a writ of *mandamus* on behalf of Bradley, directed to the Supreme Court of the District of Columbia, to restore him to the office of attorney and counsellor in said court, from which he alleged that he had been wrongfully removed by it. It appeared that the said Supreme Court had issued a rule against Bradley reciting certain offensive language which, it alleged, he had used at the previous June Term of the Criminal Court, for which language the Criminal Court had entered a judgment ordering Bradley's name stricken from the rolls. The rule of the Supreme Court of the District of Columbia ordered that Bradley show cause why he should not be punished for contempt of that court.

The Supreme Court of the United States found that the Supreme Court of the District of Columbia was a different court from the Criminal Court, and that hence the former court had no power to disbar an attorney for a contempt of the latter.

In discussing the functions of the writ of *mandamus* Mr. Justice NELSON, in delivering the opinion of the Court, says [p. 377]:

"We are not concerned, however, to examine in the present case how far this Court would inquire into any irregularities or excesses of the Court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. * * * The ground of our decision upon this branch of the case is, that the Court below has no jurisdiction to disbar the relator for a contempt committed before another Court. The contrary must be maintained before this order can be upheld and the

writ of *mandamus* denied. No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void.

" * * * The same principle is also stated by Chief Justice MARSHALL in *Ex parte* Burr. 'There is then,' he observed, 'no irregularity in the mode of proceeding which would justify the interposition of this Court. It could only interpose on the ground that the Circuit Court had clearly exceeded its powers, or, had decided erroneously on the testimony.' * * * So in *Ex parte* Secombe, Chief Justice TANEY, after showing that the question was one of judicial discretion, observes, '*We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or amend its decision, when the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion.*'"

It will be seen that in this case the decision of the Supreme Court rested entirely upon the fact that the court below had, on the face of the record, no jurisdiction, that no amount of judicial discretion could supply this defect of jurisdiction, and that the subject matter was not before it.

In the case of

Insurance Company vs. Comstock,

[16 Wallace's Reports, 258]

a petition had been filed in the District Court for involuntary bankruptcy and exceptions taken to the rulings of the Court on the subject of the evidence and to its authority. After judgment, the cause was removed by writ of error to the Circuit Court having appellate jurisdiction, but the Circuit Court, without any consideration or examination of the exceptions taken or errors assigned, dismissed it for want of jurisdiction. Thereupon, a writ of error was taken to the United States Supreme Court. That Court dismissed the writ of error for want of jurisdiction, and stated that *mandamus* was the proper remedy. The reasons for this conclusion are summarized by Mr. Justice CLIFFORD (p. 270), where, in delivering the opinion of the Court, he says :

" Repeated decisions of this Court have established the rule that this Court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in the proper case to direct a subordinate Federal court to decide a pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law ; and in the case of *Ex parte* Bradstreet, this Court decided, MARSHALL, C. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000, and that the Court in such case will issue the writ to a Circuit Court or a District Court exercising Circuit Court powers, in a case where the subordinate court had improperly dismissed the case, requiring the Court to reinstate the case and to proceed to try and adjudge the issues between the parties."

It will be observed that the Supreme Court in this case acted upon the same principle as controlled its action in the case of *ex parte* Bradstreet, namely, that it was the duty of the inferior court to decide the case before it, and render such judgment therein as might enable the parties to exercise their right of appeal to the Supreme Court of the United States. In neither of these cases was the inferior court directed to decide the case before it in a certain manner or in favor of one of the parties, but was simply ordered to discharge its duties and decide the case one way or the other, and not to dismiss it without entering judgment, thus defeating the right of appeal.

The case of

Railroad Company vs. Wiswall,

[23 Wallace's Reports, 507.]

is one in which a citizen of Illinois sued, in one of the inferior State courts, the Chicago and Alton Railroad Company. That company secured an order from the Circuit Court of the United States for the Southern District of Illinois commanding the State Court to send the

record to it. This the State Court did. Subsequently, however, the Circuit Court, being satisfied that it had no jurisdiction, on motion of the plaintiff, remanded the case to the State Court. To that remanding order the railroad company took a writ of error, and the plaintiff moved in the Supreme Court to dismiss the writ, the ground of the motion being that the remanding order was not a final judgment or decree, and that the proper proceeding of the Company was a motion for *mandamus* to the Court below to act and not by writ of error to review what was done.

Chief Justice WAITE, in reading the opinion of the Court, says (p. 508):

"The writ of error is dismissed upon the authority of Insurance Company vs. Comstock. The order of the Circuit Court remanding the cause to the State court is not a final judgment in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Here again it will be noted that the command to the Circuit Court is to hear and decide, and the writ of error is denied because no reviewable decision has been made. This case consistently follows the rule laid down in the former cases above referred to.

In the case of

Ex parte Loring,

[94 U. S., 418.]

there was a petition for a *mandamus* to the Circuit Court of the United States for the Eastern District of Michigan. It appears that an action was brought in that Court, and that after a jury had been impaneled and testimony on the part of the plaintiff concluded, he elected to take a non-suit and that a judgment to that effect was entered. Subsequently, the plaintiff moved to set aside this judgment and restore the case to the docket for trial. This motion was granted, and the defendant appeared and moved to vacate the order made. The motion to vacate was denied and the petition for the writ of *mandamus* was filed to require the

Circuit Court to vacate the order setting aside the nonsuit.

In denying the petition for the writ of mandamus, Mr. Chief Justice WAITE, delivering the opinion of the Court, said (p. 419):

"It seems clear to us that the object in this case is to use the writ of *mandamus* as a writ of error. This cannot be done. *We may require the Circuit Court to decide in a proper case if it refuses to act, but cannot control its decision.* Here the Court has acted, and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of *mandamus* has no such office to perform."

In the case of

Virginia vs. Rives,

[100 U. S., 313.]

application was made to the Supreme Court for a writ of mandamus upon the following facts:

The case was brought in the Circuit Court of the State of Virginia upon an indictment for murder, and, having come to trial, the defendants moved the court that the jury be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled, and thereupon the defendants, before trial, filed another petition praying for a removal of the case into the Federal Court. The petition alleged that the right secured to the petitioners by law providing for the equal civil rights of all the citizens of the United States was denied to them by reason of the denial of their motion. Petition for removal was denied by the State Court, and the case proceeded to trial and the defendants were convicted. Subsequently a copy of the record was obtained, and the cases upon petition were ordered to be docketed in the Circuit Court of the United States, and a writ of *habeas corpus* was issued by virtue of which the defendants were taken into the custody of the United States Marshal. No motion was made in the Circuit Court to remand the prosecutions to the State Court, but the Commonwealth

of Virginia appealed to the Supreme Court for a rule to show cause why a *mandamus* should not issue commanding the Federal Court to order the re-delivery of the bodies of the defendants to the State officers.

The Supreme Court in allowing the writ, holds that no case for removal is made out by the petition inasmuch as there is no allegation of any laws of the State of Virginia denying to the petitioners their civil rights in the judicial tribunals of the State, this being the ground upon which the removal is sought, and that the improper and unwarranted acts of the State officers were, if true, a criminal misuse of the State law but could not be said to be a denial or disability to enforce in the judicial tribunals of the State the rights of colored men as contemplated by the removal act. In passing on this question the Court, speaking through Mr. Justice STRONG, says (p 321):

"It is to be observed that act gives the right of removal only to a person 'who is denied, or can not enforce, *in the judicial tribunals of the State* his equal civil rights,' and this is to appear before the trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals of the State the presumption is fair that they will be controlled by it in their decisions; and in such a case, a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sec. 641. But, when a subordinate officer of the State, in violation of a law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or can not enforce, in the judicial tribunals of the State the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial was commenced."

It will be noted that in this case the Supreme Court bases its decision upon the fact that the petition for removal does not itself assert the existence of the conditions required by the removal act in order to permit the removal of the case and that, it being ap-

parent that these conditions do not exist, the Circuit Court is consequently without power to assume jurisdiction of the case.

In discussing the office of the writ of *mandamus*, the cases in which the same will be issued, and the purposes for which intended, the Court says, speaking through Mr. Justice STRONG (p. 323):

"In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and keep them within their lawful bounds."

A case in which the facts are practically identical with the facts in the present case is that of

Ex parte Hoard,

[105 U. S., p. 578.]

In that case it appeared that the Chesapeake and Ohio Railroad Company began a suit in a State Court of West Virginia to appropriate lands for the use of its road. The Company, at a certain stage of the proceedings, filed a petition, under the then existing Removal Act of 1875, for the removal of the suit to the District Court of the United States for the District of West Virginia. After the petition was filed and security given, a copy of the record of the suit in the State Court was filed in the District Court and the case docketed there. This having been done, certain of the defendants moved the District Court to remand the case and strike it from the docket, and this motion, having been argued and considered, was denied. Thereupon the moving defendants petitioned the Supreme Court for a writ of *mandamus* requiring the District Court to grant their motion. In denying the petition

this Court, speaking through Mr. Chief Justice WAITE, reviewed the prior decisions of the Court and said (p. 579) :

" Before the act of 1875, it was held, in *Insurance Company vs. Comstock* (16 Wall. 258), followed in *Railroad Company vs. Wiswall* (23 *id.*, 507), that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by *mandamus* from this court 'to compel the Circuit Court to proceed to a final judgment or decree,' and not by writ of error or appeal. This was on the authority of *Ex parte Bradstreet* (7 Pet. 633), in which Mr. Chief Justice MARSHALL delivered the opinion. No case can be found, however, in which a *mandamus* has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or writ of error can be taken ; and in *Ex parte Bradstreet* it was stated, as the reason for allowing the *mandamus*, 'that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of Two Thousand Dollars,' now, of course, Five Thousand. If the cause be retained, it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If it be improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in *Railroad Company vs. Koontz*, 104 U. S. 5.

It is of no importance that the value of the matter in dispute may be less than $5,000. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The act of 1875 has given an appeal or a writ of error to this court for the review of orders to remand, without regard to the amount involved (*Babbitt vs. Clark*, 103 *id.* 606).

The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final (*Ex parte Ferry Company*, 104 *id.* 519).

It is an elementary principle that a *mandamus* can not be used to perform the office of an appeal or a writ of error *(Ex parte Loring*, 94 *id.* 418).

Without determining, therefore, whether the case was properly removed or not, the writ is denied."

This case was decided while the Act of 1875 was in force giving the right to appeal by writ of error from an order remanding a case to the State Court, but it will be observed that this writ, the Court says, is given so that a review of such a decision may be had which would not otherwise exist and that the same right of appeal was not given by the Act of 1875 to review an order refusing to remand a case because that order would ultimately be reviewable by the Supreme Court after final judgment and appeal to it.

In

In re Pennsylvania Company, Petitioner

[137 U. S., 451],

a petition for *mandamus* to the Judges of the Circuit Court of the United States for the District of Connecticut, to compel said Court to take jurisdiction of a suit of one Roraback, was denied. It appears that the suit was commenced in the Court of Common Pleas for Litchfield County, Connecticut. The demand was for the sum of $500. The defendant corporation filed a petition for the removal of the suit to the United States Circuit Court on the ground of prejudice and local influence, filing therewith proper affidavit and bond. The Company entered in the Circuit Court a copy of the record and also filed a petition reciting previous steps, and re-alleging the ground for removal, and praying the Court to take jurisdiction of the suit. Thereafter the plaintiff moved to remand on the ground that the amount in controversy did not exceed the sum of $2,000 inclusive of interest and costs.

The Circuit Court granted the application and made an order remanding the case and refused to take jurisdiction.

In denying a writ of mandamus directing the reinstatement of the case, the Supreme Court, speaking by Mr. Justice BRADLEY, says (p. 452):

"The first question to be decided is, whether this Court has power to grant the writ applied for. The general power of the Court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions (*Ex parte Bradstreet*, 7 Pet. 634; *Life and Fire Ins. Co. vs. Wilson*, 8 Pet. 291; *United States vs. Gomez*, 3 Wall. 752; *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699, 702; *Ins. Co. vs. Comstock*, 16 Wall. 258, 271; *Railroad Co. vs. Wiswall*, 23 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *Harrington vs. Holler*, 111 U. S. 796; *Ex parte Brown*, 116 U. S. 401; *Ex parte Parker*, 120 U. S. 737; *Ex parte Hollon Parker*, 131 U. S. 221).

It is true that after a case has proceeded to the filing of a declaration and plea to the jurisdiction, or its equivalent, and a judgment in favor of the plea and a consequent dismissal of the action, this court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy (*Ex parte Balt. & Ohio Railroad*, 108 U. S., 566; *Ex parte Railway Co.*, 103 U. S. 794).

But it was expressly held in *Railroad Co. v. Wiswall*, 23 Wall. 507, that a mandamus would lie to compel a Circuit Court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by Chief Justice MARSHALL in *Ex parte Bradstreet*, 7 Pet., 634; and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.

But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the act of March 3, 1875, (determining the jurisdiction of the Circuit Courts), provided that the order of the Circuit Court dismissing or remanding a cause to the state court should be reviewable by the Supreme Court on writ of error or appeal, as the case might be. 18 Stat. 470, 472, c. 137. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal

upon orders to remand causes to the state courts, was abrogated."

After quoting the amendment of 1887–88, which is set forth above, Mr. Justice BRADLEY continues (p. 454):

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionable a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

The next case in point of time is

Virginia vs. Paul,

[148 U. S., 107.]

which arose upon a petition by the Commonwealth of Virginia to the Supreme Court for a writ of mandamus to the Honorable John Paul, District Judge of the United States for the Western District of Virginia, holding Circuit Court, to command him to remand to the County Court of Smyth County, Virginia, an indictment against Joseph H. Carrico for the murder of James N. Nelson, found by the Grand Jury of that County and of which the Circuit Court of the United States had assumed jurisdiction under what purported

to be a petition for removal ; also to command him to restore the body of Carrico to the jailor of Smyth County from whose custody he had been taken upon a writ of *habeas corpus* issued by Judge PAUL.

The petition was based upon section 643 of the Revised Statutes authorizing the removal into the Circuit Court of the United States for trial of "any civil suit or criminal prosecution" "commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law."

The petition was sworn to on December 12, 1891, alleging that KIRK, Justice of the Peace of Smyth County, on that day issued his warrant to the constable to arrest the petitioner and bring him before the Justice on a charge of the murder of Nelson, and that the petitioner had been arrested by the constable on that warrant and was now confined in the County jail "awaiting a trial before such Justice on the charge of murder."

The petition for removal did not, therefore, seek to transfer the indictment from a State Court of competent jurisdiction, but from a Justice whose only authority was to commit the accused to await action by the Grand Jury.

In granting the writ of *mandamus* the Supreme Court, speaking by Mr. Justice GRAY, says (p. 115):

"It is important, therefore, to consider whether the conditions of that section have been complied with. By that section, it is only when the suit or prosecution has been 'commenced in any court of a State,' and 'at any time before the trial for final hearing thereof,' that it 'may be removed for trial into the Circuit Court' 'upon the petition of such defendant to said Circuit Court, and in the following manner'; 'the petition must set forth the nature of the suit or prosecution, and be verified by affidavit, and supported by certificate of coun-

sel. It 'shall be presented to the said Circuit Court, if in session, or if it be not, to the clerk thereof at his office and shall be filed in said office.' 'The case shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a case originally commenced in that court.' The clerk of the Circuit Court is required, when a case is commenced in a state court otherwise than by *capias*, to issue a writ of *certiorari* to the state court for the record; and, when it is commenced by *capias*, to (issue a writ of *habeas corpus cum causa*), a duplicate of which shall be delivered to the clerk of the state court or left at his office by the Marshal'; 'and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceeding, trial or judgment therein in the state court, shall be void.'" Continuing, he says (p. 122): "It appearing upon the face of the petition for removal, as well as by the copies of records laid before this court, that no prosecution had been commenced in the state court, withing the meaning of section 643 of the Revised Statutes, when the petition for removal was drawn up and sworn to, nor even when it was filed in the Federal Court, the prosecution subsequently commenced by the presentment of an indictment in the state court was never lawfully removed into the Circuit Court of the United States; for, in all cases of removal from the state courts, the jurisdiction of the Circuit Court of the United States rests and depends upon the statements made in the petition for removal, and verified by the affidavit of the petitioner (*Virginia vs. Rives*, 100 U. S. 313, 316; *Crehore vs. Ohio & Mississippi Railway*, 131 U. S., 240; *Graves vs. Corbin*, 132 U. S, 571. 590).

The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the Circuit

Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment (*United States vs. Sanges*, 144 U. S. 310).

A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by (*Virginia vs. Rives*, 100 U. S. 313, 316, 323, 324").

It should be observed that in this case the petition for removal did not in any particular meet the requirements of the statute. It affirmatively appears, therefore, that not only had the Circuit Court exercised no judicial discretion in retaining jurisdiction but there were no facts stated in the petition bringing the case within the provisions of the statute authorizing such discretion to be exercised. In other words, the case sought to be removed to the Federal Court did not come within the provisions of that statute under any interpretation of the facts of the case.

In

In re Hohorst, Petitioner

[150 U. S. 653],

a state of facts similar to those in *ex parte* Bradstreet, is presented. An order having been granted dismissing a case for want of jurisdiction, the petitioner applied for a writ of *mandamus* directing the judges of the Circuit Court for the Southern District of New York, to take jurisdiction and proceed against the defendant and to strike from the record an order dismissing the suit, an appeal from which had been disallowed for want of jurisdiction because that order was not a final one from which an appeal would lie.

Tha Supreme Court granted the writ of *mandamus*.

In stating the opinion of the Court, Mr. Justice GRAY says [p. 663]:

"The Hamburg-American Packet Company, being liable to this suit in the Circuit Court of the United States for the Southern District of New York if

duly served with process in the District, and having been so served, and the order of that Court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the Circuit Court to take jurisdiction of this suit as against the corporation (*Railroad Co. vs. Wiswall*, 23 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *In re Pennsylvania Co*, 137 U. S. 451, 452").

In

In re Rice, Petitioner

[155 U. S. 396],

an attempt was made to secure a review by prohibition and *mandamus* of a decretal order, final in character and reviewable by appeal, and upon the principles stated in the foregoing cases the writs were denied. The following language is used by Mr. Chief Justice FULLER in delivering the Court's opinion [p. 402]:

"1. Where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the case originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is other legal remedy, by appeal or otherwise, or where a question of the legal jurisdiction of the Court is doubtful, or depends upon facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceeding (*Smith vs. Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495). Tested by these rules we are clear that a proper case is not made for awarding a writ of prohibition.

2. *The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law* (*American Construction Company vs. Jacksonville Railway*, 148 U. S. 372, 379).

The Circuit Court has proceeded to judgment in the premises, and we cannot revise and reverse its decision

by resort to this writ in the manner proposed, nor can we command it to adjudicate upon the rights of parties not before it by directing it to cause securities which may have been deposited, to be returned to their owners and to restore the parties to their original positions."

In

In re Atlantic City Railroad,

[164 U. S., 633],

an application was made for leave to file a petition for a writ of *mandamus* directing the United States Circuit Court for the Eastern District of Pennsylvania to dismiss an action against the applicant for want of jurisdiction. The applicant alleged that it had a defense to the action on the merits but was advised "that if it enters a general appearance or files an answer in the said case, it will thereby and by that act and fact forever waive all objection to the jurisdiction of said Court and this Court will be forever ousted of its jurisdiction to determine the jurisdiction of said Court in said case and that, accordingly, your petitioner has no adequate remedy unless this Court will grant the *mandamus* as herein petitioned."

In denying leave to file the petition, the Supreme Court, speaking by Mr. Chief Justice FULLER, says (p. 635):

"The general power of the court to issue a writ of *mandamus* to an inferior Court, to take jurisdiction of a cause where it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error (*In re Pennsylvania Co., Petitioner*, 137 U. S. 451; *In re Morrison, Petitioner*, 147 U. S. 14; *Ex parte Railway Company*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566).

In *In re Hohorst, Petitioner*, 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as

to all of the defendants, was not a final decree from which an appeal would lie (148 U. S. 262). Thereupon an application was made to this Court for leave to file a petition for a writ of *mandamus* to the judges of the Circuit Court to take jurisdiction and to proceed against the Company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which a writ of *mandamus* was awarded.

In this case, however, the Circuit Court entertained jurisdiction and the petitioner has its remedy by appeal if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled *(Southern Pacific Company vs. Denton*, 146 U. S. 202).

To direct the exercise of jurisdiction is quite different from a mandate not to do so, and we think we should not interpose at this stage of the case in the manner desired."

In

In re Grossmayer, Petitioner.
[177 U. S. 48],

a *mandamus* was sought against a District Judge of the United States for the Eastern District of Texas, holding Circuit Court, compelling him to enter judgment by default for the petitioner in an action brought by him in that Court.

It appears that the petitioner, a citizen of Texas, brought an action at law in said Circuit Court to recover damages against Robert G. Dun, a citizen of New York, and Robert D. Douglass, a citizen of New Jersey, alleging that the defendants carried on business in that District as an association under the name of R. G. Dun and Company, and prayed for summons to said Dun and Company to be served on Fowler, alleged to be a resident of Galveston, and Local Agent of said Dun and Company. The summons was issued and served. The defendants filed no plea, answer or demurrer, and the plaintiff moved for a judgment by default. The defendants then appeared specially and pleaded to the jurisdiction of the Court because the defendants were not a corporation but were

private individuals, and, in support of this plea, filed an affidavit of Fowler to the truth of the facts stated. The motion for judgment by default was denied and an order denying the motion was entered. The Supreme Court held that the Circuit Court had no jurisdiction of the action for want of due service upon the defendant, but stated that if proper service had been made, *mandamus* would have been the appropriate remedy.

Mr. Justice GRAY, speaking for the Supreme Court, says [p. 49]:

"The objection to the form of remedy can not be sustained. A writ of mandamus, indeed, can not be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the Circuit Court of the United States for the defendant upon a plea to the jurisdiction can not therefore be reviewed by a writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute (*Ex parte Schollenberger*, 96 U. S. 369; *Pennsylvania Co., petitioner*, 137 U. S., 451, 453; *American Construction Co. vs. Jacksonville* etc., *Railway*, 148 U., S., 372, 379; *Hohorst, petitioner*, 150 U. S. 653, 664).

In *Goldey vs. Morning News*, 156 U. S. 518, cited for the respondent, which was brought to this Court by writ of error, the Circuit Court had entered a final judgment in favor of the defendant, setting aside the summons and relieving the defendant from appearing to answer the complaint. But in the case now before us that court has done no more than to decline to enter a judgment in favor of the plaintiff. The plaintiff could not sue out a writ of error before a final judgment had been entered against him; and he could not compel the Circuit Court to proceed to final judgment, otherwise than by a writ of mandamus."

The case of

Kentucky vs. Powers,
[201 U. S. 1]

is similar in many respects to the case of Virginia vs. Rives, *supra*, and the writ of *mandamus* remand-

ing the prosecution to the State Court, as well as the other relief granted by the Supreme Court, is based entirely upon the principle that upon the record of the proceedings the removal of the criminal prosecution into the Federal Court was unauthorized by any statute of the United States.

The case arose out of a criminal prosecution commenced in one of the State Courts of Kentucky, in which the defendant filed a petition for removal into the Federal Court, on the ground that he was denied and could not enforce in the judicial tribunals of the State his equal civil rights under the laws of the United States.

It does not appear from the petition for removal, or from any part of the record, that any statutory or constitutional provision of the State of Kentucky existed which denied or attempted to deny any such civil rights, but that the alleged discrimination in respect of such rights was due to alleged illegal, corrupt or unauthorized acts of administrative and judicial officers.

The Supreme Court exhaustively reviews the cases discussing this question, and clearly draws the distinction between a denial of civil rights by the constitution and laws of the State and such denial by acts of administrative and judicial officers, and points out that the denial must be by existing statute or constitutional provision, in order that a case may be made to fall within the removal acts (Sections 641, 642, of the Revised Statutes).

As a fundamental test of the right of removal, the Court says, at page 24 :

"The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be *removed* into a Federal court unless warrant therefor be found in some Act of Congress."

The whole question involved in this case is whether the Federal Court can assume jurisdiction of a case in which it appears from the record that the grounds of removal expressly required to exist do not exist, and where no judicial act upon the part of the in-

ferior court has been or could be taken which would, if taken, confer upon the inferior court the right to proceed with the case. The decision is based entirely upon the ground that authority for the removal of the case was entirely lacking, as disclosed by the record.

The most recent case in which the writ of *mandamus* has been utilized in securing the remand to a State Court of a case over which the inferior Federal Court had no jurisdiction, is that of

Ex Parte Wisner,

[203 U. S. 449.]

In that case Wisner, a citizen of the State of Michgan, commenced an action at law in the Circuit Court for the City of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Lousiana. After service of the summons upon Beardsley, he filed his petition to remove the action from the State Court into the Circuit Court of the United States for the Eastern District of Missouri, on the ground of diversity of citizenship; and bond having been filed, an order of removal was entered by the State Court and transcript of the record was filed in the Circuit Court of the United States. Wisner forthwith moved to remand the case upon the ground that the suit did not involve a controversy within the jurisdiction of the Court, and that it appeared upon the face of the record that the plaintiff was a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and that the cause was not one within the original jurisdiction of the Court. The motion to remand was denied, and Wisner applied to the United States Supreme Court for a writ of mandamus, and subsequently the mandamus was awarded by the Supreme Court.

The Supreme Court bases its decision entirely upon the well settled principle that no action is removable under the provision of the removal statute relied upon, unless it be one that the plaintiff could have brought originally in the inferior Federal Court, and that it is apparent from the record in the case that this could

not have been done in the action before it. It points out that, on account of the diversity of citizenship, neither one of the parties being a citizen or inhabitant of the district into which the case was removed, the case could not have been brought originally in the Federal Court, for that district, nor could the Court have obtained jurisdiction of the action with the consent of both parties. The Court emphasizes this view by referring to the case of Shaw against Quincy Mining Co., 145 U. S., 444, where it is said, in discussing the jurisdiction of the Circuit Courts, that

"* * * where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides."

In applying this principle to the case before it, the Court says, at page 460:

"In the present case, neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance."

The conclusion reached by the Supreme Court is that the case should have been remanded for the reason that the Circuit Court had no jurisdiction to proceed with it, and on the face of the record could not have acquired such jurisdiction, either originally or consequently, through removal.

The distinction between the Wisner case and the present one is apparent. In the Wisner case the utter absence of jurisdictional requirements appears on the face of the record, or, rather, allegations there appear which affirmatively show that the action is not one which could have been originally brought in the forum to which it was removed. No judicial action or decision upon the part of the inferior court is reviewed or reversed, or even considered, and the case is not directed to be remanded on the ground of erroneous judicial decision or action, but rather, on the ground of

the impossibility of any judicial action or decision at all being taken or made by the inferior Federal Court, for the reason that there being utter lack of jurisdiction apparent from the record, no action upon the part of the Federal Court could be validly taken. The removal proceedings on their face were defective, and for this reason had no more effect to give jurisdiction to the Circuit Court than would result from the service of a defective warrant or other process.

In the present case the removal is prayed for and granted upon the ground that the removing defendant is the only defendant whose presence upon the record is necessary for the complete determination of a controversy solely between it and the plaintiff. If this contention is correct, there is no doubt but that the action is one of which the Circuit Court could have originally obtained jurisdiction.

The plaintiff, a citizen and resident of the Southern District of New York, could have originally sued The Wabash Railroad Company, a citizen of Ohio, in the United States Circuit Court for the Southern District of New York, to annul its corporate action, upon the ground that such action was expressly prohibited by its charter. Such action could have been instituted by the plaintiff against The Wabash Railroad Company as the sole defendant in said Court. See *McCormick Harvesting Machine Company vs. Walthers*, 134 U. S., 41; *St. Louis and San Francisco Railway Company vs. McBride*, 141 U. S., 127; *Mexican Central Railway Company vs. Eckman*, 187 U. S., 429; *Dinzy vs. Illinois Central Railroad Company*, 61 Fed. Rep., 49.

The question as to whether or not the contention is a a sound one, is a question which has received judicial construction and determination by the Federal Court below upon the decision of the motion to remand, and a judicial act which is within the scope of the jurisdiction of the Court below has resulted from that Court's decision, which, if erroneous, may be properly reviewed by this Court upon writ of error after final judgment has been entered in the case.

To pass upon the correctness or incorrectness of the

judicial act at this time and in this manner, would result in the employment of a writ of *mandamus* in a manner which this Court has repeatedly disapproved of and condemned, and would be seeking through the use of the writ to amend or reverse a decision of an inferior tribunal, which in its nature is a judicial act and within the scope of its jurisdiction.

The following cases, decided by the Circuit Court of Appeals for the Eighth Circuit, aptly discuss the question of the use of writs of *mandamus* to review proceedings in inferior tribunals :

In the case of

United States vs. Judges of the United States Court of Appeals of Indian Territory,

[85 Fed Rep., 177,]

a petition was filed by one Harless upon which the United States Circuit Court of Appeals issued to the Judges composing the United States Circuit Court of Appeals in the Indian Territory its alternative writ of *mandamus* commanding them to admit the relator to bail during the pendency of his appeal to that Court from a judgment of conviction rendered against him on July 10, 1897, by the United States Circuit Court in the Indian Territory, or to show cause why they refused to do so. A return was made, and the relator then moved for a peremptory writ. It appeared that the relator was convicted in the United States Circuit Court in the Indian Territory of the crime of receiving stolen property ; that he appealed from that judgment to the United States Court of Appeals in the Indian Territory ; that while this appeal was pending he applied to the judge before whom he had been tried to be admitted to bail pending his appeal, and his application was denied ; that he then filed in the United States Court of Appeals in the Indian Territory a petition for a writ of *habeas corpus* and for admission to bail pending his appeal in that Court. His petition was heard by that Court and was dismissed. The appeal from the judgment of conviction was still

pending and undetermined in the United States Circuit Court of Appeals in the Indian Territory.

In denying the motion for peremptory writ of mandamus, the Circuit Court of Appeals, speaking through SANBORN, Circuit Judge, says, at page 179:

"Moreover, the question whether the relator is entitled to be admitted to bail while his appeal is pending in the United States court of Appeals in the Indian Territory is a judicial question which has already been decided by that court after full argument, and the only purpose which the relator seeks to accomplish by this writ is to obtain a review of that decision by this court, and its direction to the court below to reverse the judicial decision it has already rendered. But the writ of mandamus may not be made to perform the office of an appeal or of a writ of error to review the action of a court in the lawful exercise of its jurisdiction, nor can it issue to command a court or an officer to decide a judicial question in a particular way; much less may it be invoked to direct such a court or officer to reverse a decision of a judicial question which has already been rendered. *In re* Rice, 155 U. S., 396, 403, 15 Sup. Ct., 149; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 379, 13 Sup. Ct., 758; *In re* Parsons, 150 U. S. 150, 156, 14 Sup. Ct., 50; *Ex parte* Morgan, 114 U. S., 174, 5 Sup. Ct. 825; *Ex parte* Whitney, 13 Pet. 404."

In the case of

Kimberlin vs. Commission to Five Civilized Tribes, et al.

[104 Fed. Rep., 653,]

a writ of mandamus was sought directed to the Commission commanding it to enroll the applicant as a citizen of the Chickasaw Nation. The facts under which the applicant claimed, were presented by a petition to the Commission, and the Commission refused to enroll the applicant. Thereupon the applicant filed a complaint for a mandamus in the United States Court in the Indian Territory, which Court subsequently denied the application. This decision was removed by writ of error to the United States Court of Appeals in Indian Territory, where it was affirmed.

In delivering the opinion of the Circuit Court of Appeals affirming the judgment of the courts below, SANBORN, Circuit Judge, says (p. 655):

"The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another. It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision, even though there may be no other method provided by the law for the review or correction of the error. *In re* Harless, 85 Fed., 177, 180, 29 C. C. A. 78, 81, 56 U. S. App., 33, 37; *In re* Rice, 155 U. S., 396, 403, 15 Sup. Ct., 149, 30 L. Ed., 198; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S., 372, 379, 13 Sup. Ct., 758, 37 L. Ed., 486; *In re* Parsons, 150 U. S., 150, 156, 14 Sup. Ct., 50, 37 L. Ed., 1034; *Ex parte* Morgan, 114 U. S., 174, 5 Sup. Ct., 825, 29 L. Ed., 935; *Ex parte* Whitney, 13 Pet., 404, 10 L. Ed., 221; *In re* Atlantic City R. Co., 164 U. S., 633, 635, 17 Sup. Ct., 208, 41 L. Ed., 579; *In re* Westervelt, 98 Fed., 912, 39 C. C. A., 350. * * *"

Concluding, he says (p. 662):

"Under the settled rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed."

The case at bar, therefore, differs from all the cases in which a writ of *mandamus* has been granted, in that the court below had jurisdiction of the case under the removal statutes, if in fact a separable controversy existed. The Court had likewise, clear judicial discretion to determine that fact. It did so determine it, and to now grant the writ of *mandamus*, commanding the court below to reverse its judgment in that particular, would be to substitute this court's judgment for the judgment of the Circuit Court in that respect. This is the office, not of the writ of *mandamus*, but of a writ of error or appeal.

POINT II.

The proper and adequate remedy is by appeal after entry of final judgment or decree.

It is abundantly shown by the authorities already referred to, that the writ of *mandamus* cannot be used to perform the functions of an appeal or writ of error, and is only granted when there is no other adequate remedy available. It is necessary, therefore, to determine whether the petitioner has an adequate remedy by way of an appeal or writ of error.

STATUTES.

By Sec. 5, of Ch. 517 of the Act of May 3, 1891, (1 Supplement Revised Statutes 903) it is provided:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is clearly shown by the following authorities that

the foregoing statute provides an adequate remedy to the petitioner by way of direct appeal to the Supreme Court of the United States from a final judgment or decree.

DECISIONS.

In the case of

Graves vs. Corbin,
[132 U. S., 571],

a bill in equity had been filed in the State Court by a creditor of a partnership to reach partnership assets. The prayer of the bill was that certain judgments confessed by the firm in favor of various parties defendant, some of whom were citizens of the same State as plaintiff, might be set aside as fraudulent. One of the defendants, a citizen of a different State from the plaintiff, removed the entire cause into the Circuit Court of the United States, alleging in his petition for removal that the complaint set forth a separable controversy, which could be fully determined as between him and the plaintiff without the presence of any of the other parties defendant.

After a transcript of the record was filed in the Circuit Court, the plaintiff moved to remand the case to the State Court, and this motion having been considered by the Circuit Court, was denied, and the suit proceeded to final decree in favor of the plaintiff. On an appeal from this decree, the Supreme Court of the United States held that the case was not removable under the Act of March 3, 1875, the allegations of the bill showing that there was but a single controversy between the plaintiff and all of the defendants, reversed the decree and remanded the case to the Circuit Court, with directions to remand it to the State Court for a retrial.

In delivering the opinion of the Supreme Court, Mr. Justice BLATCHFORD says (p. 590) :

" Under the provision of section 5 of the act of March 3, 1875, 18 Stat. 472, that if, in any suit removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of

said Circuit Court, at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed, as justice may require, this court has held that when it appears to this court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below, and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. *Williams* v. *Nottawa*, 104 U. S. 209. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court, in *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555; *Mansfield &c. Railroad* v. *Swan* 111 U. S. 379, 386; *Farmington* v. *Pillsbury*, 114 U. S. 138, 144; and *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225, 226.

"* * * It is suggested that it is a hardship to the plaintiff to reverse his decrees for want of jurisdiction in the Circuit Court after he has prosecuted his suit in that court successfully, on his being taken into that court adversely more than six years ago. *The answer is that the jurisdiction of this court in the present case to review the question of the jurisdiction of the Circuit Court could only arise on the hearing of an appeal from a final decree of the latter court, because by § 5 of the act of March 3, 1875, 18 Stat. 472, this court was authorized to review only an order of the Circuit Court remanding a cause, and not one retaining jurisdiction over it.* Even that provision was repealed by § 6 of the act of March 3, 1887, 24 Stat. 555; and this court can now review a question as to the jurisdiction of a Circuit Court only in reviewing a final judgment or decree, although by the act of February 25, 1889, 25 Stat. 693, it may do so in a case not involving over $5000."

In the case of

Missouri Pacific Railway Company vs. Fitzgerald,

[160 U. S. 556]

which was decided after the passage of the Judiciary Act of March 3, 1891, an attempt was made to secure a

review by the Supreme Court of the United States of an order remanding the case to the State Court, the plaintiff in error having secured a writ of error to the State Court after the entry of a final judgment.

In dismissing the writ of error, the Supreme Court, speaking through Mr. Chief Justice FULLER, reviews the history of the legislation relating to the removal of causes, and states (p. 582):

"If a case be removed to the Circuit Court and a motion to remand be made and denied, then after final judgment the action of the Circuit Court in refusing to remand may be reviewed here on error or appeal. *Graves v. Corbin*, 132 U. S. 571.

"If the Circuit Court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode. *The Removal cases*, 100 U. S. 457."

In the following cases, all of which have been decided since the passage of the Judiciary Act of May 3, 1891, the jurisdiction of the Federal Court has been reviewed by an appeal or writ of error: *Remington vs. Central Pacific Railroad Company*, 198 U. S., 95; *Dawson vs. Columbus Trust Company*, 197 U. S., 178; *Thomas vs. Board of Trustees*, 195 U. S., 207; *Raphael vs. Trask*, 194 U. S., 272; *Minnesota vs. Northern Securities Company*, 194 U. S., 48; *Geer vs. Mathieson Alkali Works*, 190 U. S., 428; *Hennessy vs. Richardson Drug Company*, 189 U. S., 25; *Boston & Montana Consolidated Copper, &c., Company vs. Montana Ore Purchasing Company*, 188 U. S., 632; *Mexican Central Ry. Company vs. Eckman*, 187 U. S., 429; *Wheless vs. St. Louis et al.*, 180 U. S., 379; *Loeb vs. Columbia Township Trustees*, 179 U. S., 472; *Louisville, &c., Ry. Company vs. Louisville Trust Company*, 174 U. S., 552; *New Orleans vs. Quinlan*, 173 U. S., 191; *Barrow Steamship Company vs. Kane*, 170 U. S., 100; *Wetmore vs. Rymer*, 169 U. S., 115; *Mattingly vs. N. W. Virginia Railroad Company*, 158 U. S., 53; *Mexican Central Railroad Company vs. Davidson*, 157 U. S., 201.

The foregoing are the more important cases bearing upon the question at issue. In none of them has this court sanctioned the issue of a writ of mandamus requiring the remanding of a case by a lower court, where the statutory prerequisites of removal appeared in the record, and the court below, in the exercise of its judicial functions and within the scope of its jurisdiction, has performed a judicial act.

In the present case the record discloses :

An action commenced by a citizen and resident of the Southern District of New York, in the Supreme Court of that State, against The Wabash Railroad Company, a foreign corporation, and other defendants, some of whom are residents of the State of New York, in which action the matter in dispute exceeded the sum of $2,000, exclusive of interests and costs.

A petition and bond are filed by the defendant The Wabash Railroad Company, in the form prescribed by law, for the removal of the action into the Circuit Court of the United States for the Southern District of New York, on the ground that the other defendants were not indispensable or necessary parties to the complete determination of a separable controversy, which was entirely between the plaintiff and the removing defendant, citizens of different States.

After the record is filed in the United States Circuit Court, a motion to remand the case is made by the plaintiff and argued, the grounds of the motion being stated.

The decision is rendered by the court below denying the motion to remand and sustaining the right of removal asserted by the removing defendant, and an order is entered thereon.

In the present case we find, therefore, no absence from the record of the requirements necessary to permit a removal of the case. On the contrary, all necessary requirements affirmatively appear.

The whole issue upon the motion to remand is, whether a complete determination of a separable controversy can be had without the presence of the defendants other than The Wabash Railroad Company,

and this question has been judicially determined by the proper tribunal, to which it was regularly presented. To issue a writ of *mandamus* to that tribunal, directing the remand of the action, would constitute a premature review and reversal of this judicial determination in a manner not permitted by law.

Whether or not the other defendants were indispensable parties ; whether or not a separable controversy existed, are judicial questions which have been decided by the proper tribunal, whose decision thereon is final until reversed in the regular manner.

The correctness or incorrectness of the judicial action taken by the court below in deciding these questions cannot be reviewed by this Court at this time and in the manner sought. Such action has been taken, and the right of the court to act may be considered ; but it appearing that this right existed and that the judicial action was taken without abuse of judicial discretion, the petitioner must await the entry of a final judgment before attempting to review by appeal the action of the court below.

POINT III.

In not discussing the question elaborately presented in petitioner's brief that there is no separable controversy we do not concede this contention. In our view, in the present status of the case, the discussion is irrelevant.

The rule should be discharged and the petition for mandamus denied.

Respectfully submitted,

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